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Supreme Court of the United States.

OCTOBER TERM, 1930

No. 336

UNITED STATES OF AMERICA, *ex rel.* COSTAS CATECHES,

Petitioner,

vs.

BENJ. M. DAY, U. S. Commissioner of Immigration,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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THE BALLOU PRESS NEW YORK

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Opinion Below.

Neither the Court below nor the District Court rendered an opinion herein.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 17, 1930 (R. 19). The petition for certiorari was filed in this Court on August 7, 1930 (R. 20) and certiorari was granted October 13, 1930 (R. 19). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Single Question Presented.

The instant case involves only one question of law:

Are seamen who desert their vessels without being regularly temporarily admitted under Section 3 (5) of the Immigration Act of May 26, 1924 (8 U. S. C. A. 303), for the purpose of reshipping foreign on another vessel within sixty days after such admission as provided by Section 33 of the Immigration Act of February 5, 1917 (8 U. S. C. A. 168), and who remain unlawfully in the United States for more than three years, subject to deportation at any time under Section 14 of the Immigration Act of May 26, 1924 (8 U. S. C. A. 214), which by its terms applies only to seamen regularly temporarily admitted and who remain beyond said sixty-day period; or is their deportation barred by the three-year limitation fixed by Section 34 of the Immigration Act of February 5, 1917 (8 U. S. C., 166), which section applies solely to aliens whose *landing* is unlawful?

Statutes and Regulations Involved.

The statutes and regulations involved are quoted from time to time as reference is made thereto.

Statement.

Costas Cateches, a Greek seaman, deserted his ship at Boston in October, 1925 (R. 11-13).

On May 3, 1929, more than three years thereafter, a warrant for his arrest was issued by the Assistant to the Secretary of Labor, under the act of May 26, 1924, containing the sole charge that

> "He has remained in the United States for a longer time than permitted under the said act or regulations made thereunder;" (R. 8),

and on May 8, 1929, he was taken into custody (R. 9).

He was accorded a hearing on May 8, 1929 (R. 9-14) no additional charges were preferred against him and on June 11, 1929, a warrant issued for his deportation on the same ground (R. 14).

On September 9, 1929, a writ of habeas corpus issued (R. 2) and on September 17, 1929, it was dismissed without opinion by Hon. Francis G. Caffey, *D. J.* (R. 15).

An appeal to the Circuit Court of Appeals, Second Circuit, was allowed on September 19, ~~1930~~ 1929 (R. 16), which, on May 12, 1930, without opinion, affirmed the court below (R. 19).

Specification of Errors to Be Urged.

1. The court erred in affirming the order of the trial court.

2. The court erred in holding that the three-year statute of limitation as provided in Section 34 of the Immigration Act of 1917 did not prevent the deportation of petitioner.

3. The court erred in holding that the petitioner could be deported as provided by Section 14 of the Immigration Act of 1924, without regard to the time of his entry.

Summary of Argument.

The deportation of the petitioner was not authorized by Section 14 of the Immigration Act of 1924. That section provides that "any alien who at any time after entering the United States is found * * * to have remained therein for a longer time than permitted under this act or regulations made thereunder, shall be taken into custody and deported * * *", because he was not "permitted" or "admitted" to enter temporarily under Sections 3 (5) and 15 of the 1924 Act for the purpose of reshipping foreign under Section 33 of the 1917 Act or for hospitalization under Section 19 of the 1924 Act. He simply deserted his ship in violation of

said Section 33 of the 1917 Act. Therefore, petitioner has not remained in this country for a longer time than that allowed by law or regulations lawfully issued under Section 15 of the Immigration Act of 1924, because any regulations promulgated under Sections 15 and 19 of the 1924 Act are null and void insofar as they conflict with Section 33 of the 1917 Act.

Section 34 of the Immigration Act of 1917 is applicable to the petitioner, and by its express terms relates to seamen "who shall land * * * contrary to the provisions of this Act". Petitioner's entry was contrary to Section 33 of the 1917 Act, and Section 34 of that Act controls. The mere fact that the deportation proceedings were brought under the express terms of Section 14 of the 1924 Act relating to alien seamen who remain in the United States for a longer time than permitted by regulations issued under that Act, is not material if in fact the proceeding should have been brought under Section 34 of the 1917 Act.

Section 14 of the 1924 Act clearly relates to alien seamen regularly temporarily admitted under Section 33 of the 1917 Act, as well as to other aliens, and the various circuits seem to be in accord on this proposition. Such alien seamen are expressly included in Section 15 of the 1924 Act as being among those concerning whom the Secretary of Labor may make regulations governing the length of their stay in the United States, and Section 19 refers solely thereto and to seamen admitted for hospitalization. Neither section applies to alien seamen who, like the petitioner, landed contrary to the provisions of Section 33 of the 1917 Act.

The legislative history supports this construction. Furthermore, this construction would leave the Department of Labor with means of deporting temporarily admitted alien seamen who remain in this country longer than is allowed by the regulations, and gives full force and effect to both Section 34 of the 1917 Act and Section 14 of the 1924 Act.

Argument.

Prior to the rendition by the Circuit Court of Appeals, Second Circuit, on March 5, 1928, of its decision in *U. S. ex rel. Rios* v. *Day*, 24 F. (2d) 654, the various circuits apparently were in accord on two propositions with respect to the deportation of seamen who unlawfully had entered the United States; (1) that if a seaman's unlawful entry had taken place more than three years prior to his having been taken into custody in deportation proceedings, the mere fact that he had shipped at an American port for a round trip as a member of the crew of an American vessel did not break the continuity of the period between the entry and the arrest;

Weedin v. *Banzo Okada* (C. C. A., 9th Cir.), 2 Fed. (2d), 321;
Matter of Hersvik, 1 Fed. (2d), 449;
Chinese Cabin Waiter, 13 Fed., 286;
Chinese Laborers on Shipboard, 13 Fed., 291;
Ex Parte T. Nagata, 11 Fed. (2d), 178 (D. C., S. D. Cal.);
Nagle v. *Hansen*, 17 Fed. (2d), 557;
Kirk v. *U. S. ex rel. Lawrenson*, C. C. A. 5, 24 Fed. (2d), 64.

and (2), that seamen who had entered the United States unlawfully could not be taken into custody in deportation proceedings more than three years after the date of the unlawful entry because of Section 34 of the 1917 Act (8 U. S. C. 166).

However, on December 6, 1926, fifteen months prior to its Rios decision, the Circuit Court of Appeals, Second Circuit, decided the case of *U. S. ex rel. Claussen* v. *Curran*, 16 Fed. (2d) 15, which was a case wherein a seaman had entered unlawfully in 1912, never had been absent from the United States except as a member of the crews of American vessels for round trips from American ports back to American

ports, and whose last foreign voyage as a member of the crew of an American vessel terminated at Boston on March 26, 1918. A little more than three years thereafter he pleaded guilty in Maine to the crime of manslaughter, and was sentenced to more than one year's imprisonment. At the end of his imprisonment the Secretary of Labor sought to deport him under Section 19 of the Immigration Act of 1917 (8 U. S. C. 155) on the ground that he had been sentenced to imprisonment for more than a year within five years after his entry into the United States. A writ of *habeas corpus* was sued out on the ground that Claussen's original unlawful entry had taken place in 1912, that his round trips as a member of the crews of American vessels had not broken the continuity of the period, that more than five years had elapsed between his entry and the date of his sentence in 1921, and that, therefore, his deportation was barred by the five-year limitation fixed by said Section 19 of the 1917 Act, and not by the three-year limitation fixed by Section 34 thereof. In this decision the Circuit Court said:

> "* * * The exact question is whether his return on the American schooner from the foreign cruise for which he had shipped from the United States is to be deemed an entry into the United States, within the above-quoted Section 19 of the Act. The common statement which was the basis for the decisions in the Chinese Laborer (C. C.), 13 F. 291, and Chinese Cabin Waiter (C. C.), 13 F. 286, that an American vessel is to be deemed American soil, is but a fiction, and is not of universal application. *Scharrenberg* v. *Dollar S. S. Co.*, 245 U. S. 122, 38 S. Ct. 28, 62 L. Ed. 189; *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306.
>
> Clearly he was not in the United States during the voyage; equally clearly he entered the United States in March, 1918. The question before us is neither, as in *Weedin* v. *Banzo Okada* (C. C. A.), 2 F. (2d) 321, whether within other sections of the Act that entry was legal or illegal, nor, as in petition of Hersvik (D. C.), 1 F. (2d) 449, whether by making such a voyage he lost

any rights given under other sections of the Act to return to the United States. See, too, *ex parte T. Nagata* (D. C.) 11 F. (2d) 178.

We are concerned only with the meaning of the word in connection with the deportation provision for the commission of crime, and under that section, in our judgment, the word should be given the broadest interpretation. * * *" (Italics ours).

Judge Learned Hand dissented. Thereafter a Writ of Certiorari was granted and in its decision this Honorable Court said:

"The question for decision is whether petitioner was sentenced within five years after his entry into the United States. * * * It is immaterial whether he was entitled to admission or whether he lawfully entered. The cause for which his deportation was ordered arose after entry." (Italics ours.)

From all of the foregoing it clearly is to be seen that the question as to whether or not Section 34 barred the deportation of a seaman more than three years after an illegal entry, was not before the courts in the *Claussen* case.

In the *Rios* case, however, the sole question before the Court was as to whether or not the period of limitation should run from the date of his unlawful entry in 1918, or from the date of his discharge on September 25th, 1925, upon the completion of a round trip on an American vessel from an American port back to an American port. The Court said:

"While, under section 34 of the Immigration Act of 1917, deportation of an alien seaman could not be effective unless some independent ground for deportation existed (U. S. ex rel. Gioia v. Curran (D. C.) 11 F. (2d) 904; In re Lackides (D. C.) 10 F. (2d) 980), under section 14 of the act of 1924, deportation may be effected because of the fact that the seaman remained here longer than the temporary period allowed. This appellant abandoned his calling as a seaman, which alone gave him the right to stay for a temporary period

only. If he remained longer, by virtue of section 19, he was subject to deportation. His last entry in September 1925, controls *the limitation as to when he may be deported.* U. S. ex rel. Claussen v. Curran (C. C. A.) 16 F. (2d) 15. His other entries are unimportant." (Italics ours.)

In other words, it held that his last entry into the United States, whether legal or illegal, was at the termination of his round trip voyage on an American vessel on September 25, 1925, and that as he had been taken into custody within three years thereafter, he was deportable. Such holding, *except in so far as it recognized the existence of a limitation,* was directly contrary to all of the prior decisions above mentioned, and the question of the three-year limitation fixed by Section 34 of the 1917 Act was not involved. The premise that he was admitted under Section 19 of the 1924 Act is, we believe, without foundation, for the reasons hereinafter set forth.

Thereafter the Circuit Court of Appeals for the Second Circuit decided *Piccolella* v. *Commissioner,* 36 F. (2d) 1022, which covered a seaman who was arrested more than three years after desertion of his ship and cited *Rios* v. *Day, supra,* as authority for the proposition that a seaman who had entered unlawfully subsequent to July 1, 1924, could be deported at any time under Section 14 of the Act of 1924, notwithstanding the limitation of time fixed by Section 34 of the 1917 Act. Subsequently, on the authority of its decision in the *Piccolella* case, it decided *Philippides* v. *Day,* 37 F. (2d) 1015, and the case at bar, both being cases in which the arrests took place more than three years after the entries, and the Fifth Circuit, in *Zubrick* v. *Traicoff,* March 14, 1930, 38 F. (2d) 811, also cited the *Rios* case as authority for the same proposition. That the *Rios* case has no application to the question at issue is manifest from a reading of same.

On May 27, 1929, the Ninth Circuit, in *Ex Parte Bildt,* 32 F. (2d.) 894, carefully distinguished its decision in *Nagle* v. *Hansen,* by pointing out that Bildt had been regularly admit-

ted, after inspection, for a period of sixty days, to reship foreign, and, therefore, properly was deportable under Section 14 of the 1924 Act (8 U. S. C. 214) for remaining longer than permitted to. It said:

> "The language of the 1917 act is 'that any alien seaman who shall land in a port of the United States contrary to the provisions of this act shall be deemed to be unlawfully in the United States and at any time within three years thereafter upon the warrant of the Secretary of Labor be taken into custody, etc. *The difficulty of the application arises out of the fact that the initial 'landing' of the applicant was not unlawful but pursuant to permission duly given by the immigration officials. His 'landing' became unlawful only upon the termination of that period (60 days).*"

and the United States District Court for Maryland, June 14, 1929, follows this reasoning in *U. S. ex rel. Bardakos* v. *Mudd,* 33 F. (2d.) 334, and says:

> "Parenthetically, it may be pointed out that even if it be assumed that section 34 of the 1917 act (8 U. S. C. A. 166) applies to the present case as contended by petitioners (which cannot, as a matter of fact, be applicable because it relates only to alien seamen who enter into, not to those who remain in the United States, unlawfully), the three-year period therein prescribed for deportation has not expired."

Finally, on February 17, 1930, the Ninth Circuit in *Carr* vs. *Zaja,* 37 F. (2d.) 1016, again held in accord with its former decision in *Nagle* vs. *Hansen, supra,* in the following language:

> "In the facts material to the application of the statute of limitations the case does not differ from Nagle v. Hansen, decided by this court in February, 1927, 17 F. (2d) 557. Upon a re-examination of the Acts of 1917 and 1924, therein referred to, we adhere to the conclusion there reached. Appellant cites with apparent confidence United States ex rel. Rios v. Day (C. C. A.) 24 F. (2d) 654, but in that case the statute of limitations

was not involved, and it is not clear that in any respect it is to be deemed out of harmony with Nagle v. Hansen."

It would therefore appear that all of the circuits are in accord on the proposition that the cases of alien seamen unlawfully in the United States fall into two general classes; (1) alien seamen whose landing, irrespective of the date thereof, was unlawful, and whose cases, therefore, are covered by Section 34 of the 1917 Act (8 U. S. C. 166); and, (2) alien seamen who have entered the United States since July 1, 1924 pursuant to permission given by the immigration authorities and whose cases fall under Section 14 of the 1924 Act (8 U. S. C. 214), wherefore it becomes necessary to determine what constitutes an unlawful landing under the immigration laws.

Prior to the enactment of the Immigration Act of 1924 the admission and landing of alien seamen were covered by Sections 32 and 33 of the 1917 Act, Section 32 was repealed by Section 20 (d) of the Act of 1924, and Section 33 appears in the Code as Section 168 of Title 8. Said Section 32 read in part as follows:

> "That no alien excluded from admission into the United States by any law, convention, or treaty of the United States regulating the immigration of aliens and employed on board any vessel arriving in the United States from any foreign port or place, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to regulations prescribed by the Secretary of Labor providing for the ultimate removal or deportation of such alien from the United States * * *."

This portion of the said repealed section was reenacted almost verbatim as Section 19 of the 1924 Act (8 U. S. C. 166), reading as follows:

> "Sec. 19. No alien seaman excluded from admission into the United States under the immigration laws and employed on board any vessel arriving in the United States from any place outside thereof, shall be permitted

to land in the United States, except temporarily for medical treatment, or pursuant to such regulations as the Secretary of Labor may prescribe for the ultimate departure, removal, or deportation of such alien from the United States" (8 U. S. C. A. 166).

The remainder of Section 32 had to do with the imposition against and collection from the owners, agents, consignees or masters of vessels of fines for failure to detain alien seamen for immigration inspection, and it was for the purpose of strengthening the same that it was repealed and Section 20 of the 1924 Act (8 U. S. C. 167) was enacted.

In other words, while Sections 19 and 20 are parts of the 1924 act, they really are only strengthening amendments to Section 32 of the 1917 act, and properly are not parts of the 1924 act at all.

Section 33 of the 1917 Act restricted entries under Section 32 thereof, and now restricts entries under Section 19 of the 1924 Act. It reads as follows:

> SEC. 33. *That it shall be unlawful and be deemed a violation of the preceding section* to pay off or discharge any alien employed on board any vessel arriving in the United States from any foreign port or place, unless duly admitted pursuant to the laws and treaties of the United States regulating the immigration of aliens: Provided, That in case any such alien intends to reship on board any other vessel bound to any foreign port or place, he shall be allowed to land for the purpose of so reshipping, under such regulations as the Secretary of Labor may prescribe to prevent aliens not admissible under any law, convention, or treaty from remaining permanently in the United States, *and may be paid off, discharged, and permitted to remove his effects, anything in such laws or treaties or in this act to the contrary notwithstanding, provided due notice of such proposed action be given by the master or the seaman himself to the principal immigration officer in charge at the port of arrival* (8 U. S. C. A. 168). (Italics ours.)

Under this section, aside from entry for medical treatment as provided for by Section 19 of the 1924 Act, an alien sea-

man can enter the United States lawfully only after the giving of "due notice" to the immigration authorities of intention to reship foreign, and *inspection* and *admission* by them as a *discharged, paidoff* seaman who intends to reship foreign within the sixty-day period fixed by the regulations of the Secretary of Labor. The Secretary of Labor, therefore, lawfully could not promulgate any regulations permitting landing and separation from the vessel for any other purpose, and if he has done so, such regulations are null and void.

To keep effective Section 33 and solely to make possible the temporary admission necessary to permit entry thereunder after the passage of the 1924 act, Congress enacted Section 3 (5), thereof, which reads as follows:

> "SEC. 3. When used in this act the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except * * * (5) a bonafide seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman * * *" (8 U. S. C. A. 203).

and Section 15 thereof, which reads as follows:

> "SEC. 15. The *admission* to the United States of an alien excepted from the class of immigrants by clause 5 * * * of Section 3 * * * shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed * * * to insure that, at the expiration of such time or upon failure to maintain the status onder which *admitted*, he will depart from the United States" (8 U. S. C. A. 215).

Similar views as to the application of Section 33 of the 1917 Act and Sections 3, 15 and 19 of the 1924 Act evidently were held by the Court below in *U. S. ex rel. D'Istria* v. *Day*, June 6, 1927, 20 F. (2d) 302, in which it was said:

> "(2) Section 33 of the Act of 1917 (Comp. St. 4289 ¼ rr) makes it unlawful to discharge a seaman in the

United States, unless he intends to reship on another vessel bound to a foreign port, and then only in conformity with such regulations as the Secretary of Labor may promulgate. This section survives and is consistent with the Quota Act of 1924, Section 3 (5), being Comp. St. 4289 ¾ aa, which exempts from the quota seamen seeking to enter temporarily in pursuit of their calling. Section 19 of the Quota Act (Comp. St. 4289 ¾ ii) forbids any seaman 'excluded from admission' to land except as allowed by the regulations. We read it as meaning that an alien seaman discharged in the United States is 'excluded from admission' by Section 33 of the Act of 1917, unless he intends to reship and satisfies the regulations passed to ascertain that intention. Possibly Section 19 is redundant, but like Section 3 (5) it is consistent with Section 33 of the Act of 1917. * * *"

Section 34 prescribes the procedure and time within which deportation may be effected of seamen who enter in any manner other than for hospital treatment under Section 32 of the 1917 Act (now Section 19 of the 1924 Act), or for reshipment foreign under Section 33 of the 1917 Act, and reads as follows:

"SEC. 34. That any alien seaman who shall land in a port of the United States contrary to the provisions of this Act shall be deemed to be unlawfully in the United States, and shall, *at any time within three years thereafter,* upon the warrant of the Secretary of Labor, be taken into custody and brought before a board of special inquiry for examination as to his qualifications for admission to the United States, and if not admitted said alien seaman shall be deported at the expense of the appropriation for this Act as provided in Section 20 of this Act" (8 U. S. C. A. 166).

Section 34 is not rendered inoperative by Section 14 of the 1924 Act, which in so far as it is applicable to the charge in the case at bar, reads as follows:

"SEC. 14. Any alien who at any time after entering the United States is found * * * to have remained therein for a longer time than permitted under this Act

> or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in Sections 19 and 20 of the Immigration Act of 1917; * * *" (8 U. S. C. A. 214).

and this position is tenable in view of the fact that in considering this whole seamen question at the time of the passage of the 1924 Act, Congress very carefully reviewed Sections 31-36, inclusive, of the 1917 Act, only repealed Section 32 thereof by Section 20 (d) of said 1924 Act, and left effective Sections 31, 33, 34, 35 and 36. Compare *Nagle* v. *Hansen,* 17 F. (2d) 557, at 558, *ex parte Bildt,* 32 F. (2d) 894 and *Carr* v. *Zaja,* 37 F. (2d) 1016.

There is nothing anywhere in the record that indicates that this alien seaman landed in either of the two ways prescribed by law, his landing, therefore, was unlawful, his case falls squarely within Section 34 of the Act of 1917, and he was and is not deportable.

Wherefore, it is respectfully prayed that the decisions, mandates and orders below be set aside and for naught held and esteemed.

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